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IN THE

Supreme Court of the United States

October Term, 1955

No. 457

B. B. CARTER, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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(NOTE: In above index and text, the notation "(1939)" refers to Internal Revenue Code of 1939, to distinguish same from Internal Revenue Code of 1954. In provisions cited no substantial change occurs in the different codifications but sections were renumbered. The title is Title 26 in both.)

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, B. B. Carter, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on June 30, 1955.

OPINIONS BELOW

The opinion of the District Court is unreported and is printed in the Appendix hereto (infra, 1a). The opinion of the Court of Appeals is not as yet reported and is printed in the Appendix hereto (infra, 10a).

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on June 30, 1955 (infra, 13a, R. 554). A timely petition for rehearing filed on July 19, 1955 (R. 555) was denied on August 12, 1955 (infra, 13a, R. 584). By order of this Court dated September 6, 1955 the time to file petition for writ of certiorari was extended to October 10, 1955.

The jurisdiction of this Court rests on 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

1. Is an accused deprived of the assistance of counsel required by the Sixth Amendment to the Constitution when he enters a plea of guilty while represented by an attorney who had voluntarily furnished the government information leading to the very prosecution and charges upon which he is then and there arraigned?

2. Is an accused denied the due process of law guaranteed by the Fifth Amendment to the Constitution and deprived of rights under the Sixth Amendment by the action of the trial court in accepting an alleged plea of guilty to a charge of willfully attempting to evade and defeat income tax when the accused contemporaneously denies that he acted willfully, knowingly and intentionally?

3. When the rights of an accused under the Fifth and Sixth Amendments to the Constitution have been violated may the trial court exercise discretion to deny a motion to withdraw a plea of guilty by invoking the principles of equity that would apply in a civil controversy?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF PROCEDURE INVOLVED

Article V of the Amendments to the Constitution of the United States:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Article VI of the Amendments to the Constitution of the United States:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the assistance of Counsel for his defense."

Section 145 (b) of the Internal Revenue Code of 1939, 26 U.S.C., Section 145 (b):

> Failure to Collect and Pay over Tax, or attempt to Defeat or Evade Tax.—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or de-

feat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

Section 276 (a) of the Internal Revenue Code of 1939, 26 U.S.C., Section 276 (a):

"(a) False Return or No Return.—In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time."

Section 3748 (a) of the Internal Revenue Code of 1939, 26 U.S.C., Section 3748 (a):

"(a) Criminal Prosecutions.—No person shall be prosecuted, tried or punished, for any of the offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense * * * except that the period of limitation shall be six years—

(1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner,

(2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof, * * *"

Rule 11 of Federal Rules of Criminal Procedure:

"A defendant may plead not guilty, guilty or, with the consent of the court, nolo contendere.

> The court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty."

Rule 32 (d) of Federal Rules of Criminal Procedure:

> "(d) Withdrawal of Plea of Guilty. A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice, the court after sentence may set aside the judgment of the conviction and permit the defendant to withdraw his plea."

STATEMENT OF THE CASE

Petitioner, B. B. Carter, is a farmer and rancher, who has had little education and no training and experience in the keeping of books and records. His tax returns for the years 1940 to 1950 were prepared by Walter G. Russell, a tax attorney and Certified Public Accountant, from cancelled checks, bank statements, duplicate deposit slips and oral information. After the returns were prepared and certified to by Russell, petitioner signed the returns as instructed, gave Russell a check for whatever Russell said was due and Russell filed the returns (R. 68-76).

In the latter part of 1946, Russell, without petitioner's knowledge, contacted an agent of the government and voluntarily imparted to him information to the effect that petitioner was not paying all of his income tax. (R. 196, 252, 253, 327). This action by

Russell caused a fraud investigation to be made of petitioner's tax returns. (R. 257, 260). Petitioner first learned of this investigation in July or August, 1947, when a revenue agent contacted him at his home requesting certain information (R. 74). Petitioner obtained this information and transmitted it to Russell, whom he instructed to rework all of his tax returns, so that he could know if he owed any additional tax (R. 75). Russell agreed to do this but never did (R. 329, 330). Later a special agent contacted petitioner and took a statement from petitioner regarding his tax liability (R. 78).

Petitioner heard nothing further of the investigation until January, 1949, when he received in the mail, the confidential report of the revenue agent and special agent who had conducted the examination of his tax returns. Attached to this report were the original reports of every statement taken by the agents during the course of the investigation and all of petitioner's income tax returns for the years involved (R. 81). This report contained the following statement pertaining to the origination of the investigation (R. 87):

> "Mr. Walter G. Russell, Certified Public Accountant and attorney, Amarillo, Texas, contacted Internal Revenue Agent's office in Amarillo, Texas, and advised them that Mr. Carter had apparently boasted about not paying all his income tax and implied that he had purchased a ranch from income that did not pass through his bank account."

After reading the report, petitioner took it to Russell and asked Russell if it were true that he had turned petitioner in to the government. Russell denied this

vehemently even to the point of using profanity, stating (R. 81):

> "They are — — liars, there is not a word of truth in them, they will do anything to get a man in trouble."

Russell's testimony is in conflict. He testified that in January, 1949, petitioner merely left the report and that Russell didn't even look at it at that time, and that he and petitioner did not discuss it until after March 15, 1949. It was Russell's testimony that when asked about the statement regarding the investigation he said (R. 333, 334).

> "And I explained to him, I said, 'All I knew to say was that this was the rumors,' which I had been told about him, and about which I had previously informed him and I had discussed with the revenue agents."

Russell testified that when he made this explanation petitioner merely said "Oh," and they proceeded with the examination of the report (R. 335).

Petitioner accepted Russell's denial in 1949 and permitted Russell to prepare his 1948, 1949 and 1950 tax returns. In November, 1949, petitioner was notified that his returns were being sent to the Penal Division, Washington, D. C. with the recommendation that criminal prosecution be instituted (R. 139, 141). Petitioner discussed the matter with Russell and asked Russell to represent him. Russell recommended his employee, Arthur Glover. Glover, an attorney, did not accept employment in the case until January, 1950 (R. 339-342). Sometime between November, 1949 and January 1950, when Glover accepted the case, Russell made Glover a partner in his law firm. Petitioner

paid a retainer of $5,000.00 in the form of a check written out by Russell, payable to Russell, and signed by petitioner (R. 342, 393). Petitioner then turned over to Glover the confidential report (R. 89, 397).

Glover then represented petitioner before the Treasury Department and the Department of Justice in an effort to dissuade the government from instituting criminal proceedings. He filed a brief, in which the primary defense urged by Glover was that if there were any omissions of income from petitioner's returns, these omissions occurred as a result of carelessness, negligence and the shortage of help in the accounting office of his law partner, Russell. Glover's efforts failed and the case was referred to the United States Attorney for the Northern District of Texas with instructions to institute criminal proceedings (R. 404-409).

While conceding that petitioner would never admit his guilt, Glover decided in his mind that petitioner should plead guilty (R. 414). In reaching this conclusion one factor considered by Glover was that the government would compel his law partner, Russell, to answer a subpoena and to give as a witness for the government all information that he had in his files (R. 403, 404).

Glover held a conference with the United States Attorney at which he advised the government, that he did not know what he could do in regard to a plea, but would let them know (R. 205). He contacted petitioner the next day and urged him to enter a plea of guilty. Admitting petioner's innocence (R. 169, 427), Glover nonetheless insisted that he plead guilty as the easiest way out and to avoid vicious publicity that would hurt his family (R. 102, 103, 427, 428). Reluc-

tantly petitioner complied and the next day advised Glover that he would plead guilty (R. 428).

Several days later on January 17, 1951, petitioner accompanied by Earl Riffe, a grain dealer of Stratford, Texas, and A. L. Wilson, the Sheriff of Sherman County, Texas, as character witnesses, came to Dallas with Russell and Glover as his attorneys (R. 430, 500). Arriving at Dallas they went to the Federal Building where petitioner, Riffe and Wilson were seated on a bench in a corridor on the third floor, between the United States Attorney's office and the court room (R. 157, 500). Glover and Russell then had a conference with the Assistant United States Attorney, Cavitt Binion (R. 430, 475). There is some dispute about whether petitioner attended this conference. Glover and Russell testified that he did (R. 430, 346, 327). Cavitt Binion had no recollection of the matter (R. 284), and petitioner (R. 157) and A. L. Wilson categorically denied that petitioner attended this conference (R. 500, 501). Wilson stated that petitioner never left his side until they went into the court room (R. 505).

When the case was called, Russell and Glover entered their appearances for petitioner (R. 8). First the information (R. 7) charging petitioner with tax evasion for the years 1944, 1946 and 1947 was read and petitioner was asked if he waived indictment (R. 8, 9). Then the information was read to petitioner and the Court inquired whether petitioner's plea was guilty, or not guilty, to which petitioner answered, "Yes, sir." Thereupon the Court stated: "Guilty", and petitioner responded, "Guilty" (R. 10, 11).

The Court then heard from the United States Attorney after which Glover made a statement on behalf

of petitioner. In his statement Glover referred repeatedly to petitioner's accountants and petitioner's attorneys (our office), but failed to inform the Court that petitioner's accountant and petitioner's attorney were the same person, who was then in Court representing petitioner (R. 18, 19).

Two character witnesses testified on behalf of petitioner, after which the Court asked petitioner for an explanation and he stated (R. 23):

> "Judge, I haven't denied any time owing this tax to these boys, and I didn't know at the time my tax was turned in that I owed it, then. I just forgot to turn it in, I didn't keep any books, and I didn't know anything about it, that is all I have got to say about it."

The Court then discussed the case of another defendant after which the following occurred (R. 24, 25):

> "* * * We never want a man, *in* after years, however, to say that he got in trouble and he wasn't guilty, but he just plead guilty to get out of it, it was the easiest way. We feel sure your lawyer would not back that up, and we want to know if you feel that way about it?
>
> "The Defendant: I don't understand that, Judge?
>
> "The Court: I will state it to you in a different form. The Court never wants any man to plead guilty unless he feels himself to be guilty, and if you feel yourself to be innocent, then we think you should be tried, and tried by a jury.
>
> "The Defendant: I think I am guilty through neglect of my business, Judge, that is the only reason I am pleading guilty.

"The Court: You mean to say you are not willfully guilty, and did not intentionally break the law?

"The Defendant: No, sir, I did not intentionally do it, no, sir."

Without any further interrogation of defendant the Court discussed several matters not pertinent to petitioner's understanding of the case and then the Court stated (R. 27):

"It looks like you did that intentionally. By the time though that you get your delinquent tax all paid, you are going to be left almost a poor man again. The Court does not quite find it in his heart to send you to the penitentiary, yet, the circumstances justify a considerable punishment by way of a large fine."

The Court imposed a fine of $10,000.00, which petitioner paid and Judgment and Commitment was entered (R. 29).

Petitioner continued to employ Russell and Glover as his attorneys until August, 1951. At that time he employed another attorney to handle certain legal matters pertaining to the foreclosure on property which petitioner owned (R. 90, 107, 160). In February, 1954, petitioner employed counsel to examine his tax situation, who upon learning the facts of the situation advised petitioner of his constitutional rights. In April, 1954 petitioner filed a motion to withdraw his plea of guilty (R. 30). Hearing was held on the motion on May 24, 1954 (R. 66-519). On October 30, 1954 the District Court rendered an opinion and entered an order denying petitioner's motion (infra, 1a-9a).

The District Court found that Russell's actions were unethical and that since he had "turned in his client to be prosecuted," Russell should not have accepted employment to defend him (infra, 5a). Yet on the ground that the wrong done lay between petitioner and his counsel, the Court refused to rectify the violation of petitioner's rights in the criminal charge brought by the United States. In so doing it based its exercise of discretion on the same principles of equity that would apply in a civil controversy (infra, 9a). The denial of the motion was based on unreasonable delay, which allegedly permitted the limitation to run on the government's claim for taxes and that because of the delay the government's witnesses may have become unavailable (infra, 9a). There is no evidence of record that any of petitioner's witnesses have become unavailable or that the delay has prejudiced petitioner's case in any way. The opinion did not discuss petitioner's constitutional rights and made no reference to petitioner's specific denial at the time he entered his plea of guilty that he acted willfully, knowingly and intentionally.

A timely appeal was filed with the Court of Appeals for the Fifth Circuit, which Court on June 30, 1955 rendered an opinion and entered judgment affirming the action of the District Court (infra, 10a). A timely petition for rehearing was denied on August 12, 1955 (infra, 13a). The Court of Appeals did not discuss factual errors in the District Court's opinion brought to their attention by petitioner but based its determination on the facts found by the District Court. The Court of Appeals did not discuss petitioner's constitutional rights and made no reference to petitioner's specific denial at the time he entered his

plea of guilty, that he acted willfully, knowingly and intentionally. It based its decision on a conclusion that if petitioner were permitted to withdraw his plea of guilty, he could plead the statute of limitations against further prosecution, or in the alternative, reclaim some of the taxes and penalties he had been required to pay (infra, 12a).

REASONS FOR GRANTING THE WRIT

I.

The Decision of the Court of Appeals Denying an Accused the Assistance of Counsel Is in Conflict With the Decisions of This Court and, If Permitted to Stand, Will Open the Door to Cumulative Losses of Constitutional Rights

When petitioner stood before the Court charged with the commission of a felony he was represented by two law partners. One of these attorneys, Russell, was the individual who had prepared the tax returns which were alleged to have been fraudulently filed and who had counseled petitioner in tax matters. He had voluntarily imparted to the government information which caused the investigation and which formed part of the basis of the charge which petitioner was called upon to answer. The other attorney, Glover, who spoke on behalf of petitioner had been an employee of Russell and was made a partner at the time representation of petitioner in his tax fraud case was under consideration. Prior to the institution of criminal proceedings, Glover had urged as a defense that the omissions in petitioner's returns were due to the carelessness and negligence of his law partner's accounting office. In deciding whether to urge petitioner to enter a plea of guilty, Glover considered the fact that his law partner, Russell, would be called as a witness by the government if the case went to trial.

It is most serious for a defendant to be without a lawyer; it is a good deal worse for a defendant to have lawyers who are not wholly dedicated to his cause and who have interests in the case adverse to that of their client.

In *Von Moltke* v. *Gillis,* 332 U.S. 708, 68 S. Ct. 316, which involved a plea of guilty to conspiracy to violate the Espionage Act of 1917, the Court defined adequate counsel as follows at page 725:

> "The right to counsel guaranteed by the Constitution contemplates the services of an attorney devoted solely to the interests of his client.
>
> * * * * *
>
> "The Constitution does not contemplate that prisoners shall be dependent upon government agents for legal counsel and aid, however conscientious and able those agents may be. Undivided allegiance and faithful, devoted service to a client are prized traditions of the American lawyer. It is this kind of service for which the Sixth Amendment makes [redacted] provision."

This kind of assistance of counsel petitioner did not receive. The decision of the Court of Appeals is also in conflict with *Johnson* v. *Zerbst,* 304 U.S. 458, 58 S. Ct. 1019; and *Glasser* v. *United States,* 315 U.S. 60, 62 S. Ct. 457.

II.

The Decision of the Court of Appeals Permitting the Plea of Guilty to Stand Gives Sanction to a Denial of Due Process and the Right to a Trial Guaranteed by the Constitution and Stands as a Threat to Constitutional Rights

That willfulness and intent are essential elements of a charge of willfully attempting to evade and defeat taxes under Section 145(b) of the Internal Revenue Code of 1939 is not subject to question. In *Holland*

v. *United States,* 348 U.S. 121, 75 S. Ct. 127, this Court states with reference to the offense in question:

> "A final element necessary for conviction is willfulness. The petitioners contend that willfulness 'involves a specific intent which must be proven by independent evidence and which cannot be inferred from the mere understatement of income.' This is a fair statement of the rule."

After first answer "Yes, sir." to the Courts query, "Is your plea guilty, or, not guilty?" the Court said "Guilty," and petitioner responded, "Guilty." (R. 11) Thereafter, petitioner made no statement that could in any way be construed as an admission of guilt, but in response to questions of the Court he stated:

1. "Judge, I haven't denied any time owing this tax to these boys, and I didn't know at the time my tax was turned in that I owed it then." (R. 23)

2. "No, sir, I did not intentionally do it, no sir." (R. 25)

Put on notice that petitioner denied having committed an essential element of the crime with which he was charged, the Court was without power to enter judgment against petitioner.

The Fifth and Sixth Amendments stand as a jurisdictional bar to a valid conviction, and if the requirements thereof are not complied with, the Court does not have jurisdiction to proceed. *Johnson* v. *Zerbst,* supra, *Moore* v. *Dempsey,* 261 U.S. 86, 43 S. Ct. 265, *Mooney* v. *Holohan,* 294 U.S. 103, 55 S. Ct. 340. When petitioner specifically denied the essence of the crime charged, the trial court had no alternative, but to proceed in the manner provided by the Fifth and Sixth

Amendments to the Constitution. Its conviction in violation thereof is a nullity and the failure of the Court of Appeals to treat it as such constitutes a danger to the safeguards provided in the Constitution.

III.

The Decision of the Court of Appeals Affirming the Action of the District Court Is So Far a Departure From the Accepted and Usual Course of Judicial Determinations as to Call for An Exercise of the Court's Supervision

Although serious questions affecting human rights were involved, both the District Court and the Court of Appeals treated the motion for leave to withdraw plea as though it were a civil controversy to be decided on the basis of an unrelated equitable doctrine involving procedures. Both Courts displayed concern for the rights of the government, but the constitutional rights of petitioner were not mentioned by either Court.

The District Court found that Russell's conduct was unethical and that having turned in his client to be prosecuted, he should not have accepted employment to defend him, (infra 5a), and that an injury had been done to petitioner (infra 8a). Yet, it regarded the matter as a controversy between Russell and petitioner, ignoring petitioner's rights. Notwithstanding the District Court's determination with respect to Russell, the Court of Appeals stated that petitioner had "two lawyers who, according to the District Court, rendered 'conscientious and capable services' ". (infra 12a). The District Court found merely that Glover "endeavored to give the defendant Carter conscientious and capable service," (infra 6a) disregarding Glover's insistence that petitioner plead guilty against his own convictions. Also, ignored was Glover's failure to act

when petitioner upon arraignment categorically denied commission of the crime of tax evasion.

An equitable doctrine should have no bearing on the determination of petitioner's rights in a criminal case. The acceptance of petitioner's plea in disregard of his specific denials cannot be charged to petitioner. He entered a denial to every question asked by the Court pertaining to willfulness and intent. A court is not relieved of its duty to refuse to accept a plea without first determining it is intelligently made solely because accused is represented by counsel. Rule 11, Federal Rules of Criminal Procedure, infra, 4, *U. S.* v. *Davis* (C.A. 7), 212 F. 2d 264.

The District Court implied that it might have been inclined to grant the motion had it been made within a reasonable time, but denied the motion because of unreasonable delay (infra 9a) for the reason that the government cannot now be restored to where it was three years ago (infra, 8a 9a). There is no evidence to support this statement. The record does not disclose that any of the government's witnesses have become unavailable or that the government would be prejudiced by the motion.

The District Court states that limitations has run on the government's claim for taxes (infra 9a). The Court of Appeals states that petitioner will claim a refund of these taxes if the motion is granted (infra 12a). In cases of fraud there is no statute of limitations on the government's right to assess taxes, (26 U.S.C. (1939) Section 276(a), infra 4) and it is not illegal, nor improper to claim a refund of taxes, if the taxpayer believes they were erroneously collected.

The Court of Appeals was constrained to affirm the District Court on the unwarranted assumption that petitioner seeks to plead the statute of limitations against further prosecution. Petitioner's sole purpose is to withdraw his plea of guilty and enter a plea of not guilty to the information which was timely instituted against him and stand trial on the offenses charged therein. There is no statutory bar to the prosecution of petitioner under the present information. Title 26 U.S.C., (1939) Section 3748(a) (infra 4).

Without mention of the violation of petitioner's rights under the Constitution, the District Court decided, and the Court of Appeals affirmed the case on the basis of speculative injury to the government. The Court of Appeals found no proof of manifest injustice (infra, 12a). Can there be a greater manifest injustice than a disregard of due process and the violation of an accused's right to counsel? This Court stated in *Johnson* v. *Zerbst*, supra, at page 467:

> "* * * Of the contention that the law provides no effective remedy for such a deprivation of rights affecting life and liberty, it may well be said—as in Mooney v. Holohan, 294 U.S. 103, 113, 79 L. ed. 791, 794, 55 S. Ct. 340, 98 A.L.R. 406—that it 'falls with the premise.' To deprive a citizen of his only effective remedy would not only be contrary to the 'rudimentary demands of justice' but destructive of a constitutional guaranty specifically designed to prevent injustice."

The indifference manifested by the District Court and the Court of Appeals to the points raised concerning the solemn protection guaranteed to an accused by the Constitution, eloquently bespeak the interven-

tion of this Court with its supervisory powers to preserve and protect the constitutional administration of criminal law.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted.

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